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QUESTION PRESENTED

Whether 18 U.S.C. § 1962(a) requires a particularized determination whether the activities of an enterprise had a substantial effect upon interstate commerce.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE ACTIVITIES OF RESPONDENT'S GOLD MINE DID NOT HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE AND ARE THEREFORE BEYOND THE REACH OF RICO	6
A. Under this Court's precedents, Congress's power to regulate activities affecting interstate commerce extends only to those activities which individually or as a class have a *substantial* effect on interstate commerce	6
1. Most regulations of activities "affecting commerce" are "class of activities" statutes that do not require a particularized inquiry into a party's effect on interstate commerce	8
2. General prohibitions require a particularized inquiry into the nexus between a party's activity and interstate commerce	10
3. RICO is not a "class of activities" statute	11

TABLE OF CONTENTS—Continued

	Page
4. Sherman Act cases provide the best model for the appropriate judicial inquiry	14
5. Petitioner posits a standard contrary to this Court's precedent in suggesting that the "effects" on interstate commerce under RICO are sufficient if they are "perceptible and identifiable"	17
B. The *activities* of respondent's gold mine did not substantially affect interstate commerce and are beyond the reach of RICO	20
II. THE EXPANSION OF FEDERAL JURISDICTION INTO AREAS HAVING MINIMAL CONNECTION WITH INTERSTATE COMMERCE IMPOSES SUBSTANTIAL COSTS ON THE FEDERAL-STATE BALANCE AND RIGHTS GRANTED UNDER STATE LAW	23
A. The "substantial effects" test serves to preserve the delicate balance between state and federal power	24
B. RICO is already an expansive statute reaching activities other than organized crime; an extension of jurisdiction would be unwarranted and unwise	25
C. Federalization of criminal law is destroying the balance between state and federal power	28
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

	Page
Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936)	7
F.C.C. v. *American Broadcasting Co.*, 347 U.S. 284 (1954)	26
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)	19, 26
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	17, 18
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	19, 20, 23, 24
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974)	10, 12
Hammes v. *AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994)	16
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	8
Heille v. *City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982)	15
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	6, 8, 10
Holmes v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992)	16, 17
Hospital Bldg. Co. v. *Trustees of Rex Hosp.*, 425 U.S. 738 (1976)	14, 22
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	8, 9
Kolender v. *Lawson*, 461 U.S. 352 (1983)	13
Mandeville Island Farms v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948)	14, 17
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	8
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)	6
McNally v. *United States*, 483 U.S. 350 (1987)	23
McLain v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980)	8, 14, 15, 18
Moskal v. *United States*, 498 U.S. 103 (1990)	27
Musick v. *Burke*, 913 F.2d 1390 (9th Cir. 1990)	15
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)	7, 12
New York v. *United States*, 112 S. Ct. 2408 (1992)	27
Perez v. *United States*, 402 U.S. 146 (1971)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Polish Nat'l Alliance of the United States of N. Am. v. *NLRB*, 322 U.S. 643 (1944)	12, 23, 24
R.A.G.S. Culter, Inc. v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985)	18
Rewis v. *United States*, 401 U.S. 808 (1971)	26
Rose v. *Bartle*, 871 F.2d 331 (3d Cir. 1989)	18
Russell v. *United States*, 471 U.S. 858 (1985)	8, 13, 14
Schreiber Distrib. Co. v. *Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986)	25
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985)	25
Shreveport Rate Cases, 234 U.S. 342 (1914)	18
Smith v. *Goguen*, 415 U.S. 566 (1973)	13
Stone v. *William Beaumont Hosp.*, 782 F.2d 609 (6th Cir. 1986)	15
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991)	15, 16
United States v. *Darby*, 312 U.S. 100 (1940)	7
United States v. *Local 560 (I.B.T.)*, 974 F.2d 315 (3d Cir. 1992)	17
United States v. *Lopez*, No. 93-2047	19
United States v. *McNinch*, 356 U.S. 595 (1958)	26
United States v. *Reese*, 92 U.S. 214 (1876)	13
United States v. *Robertson*, 15 F.3d 862 (9th Cir. 1994)	25
United States v. *Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980)	18, 19
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942)	7, 12
Wickard v. *Filburn*, 317 U.S. 111 (1942)	8, 9, 12

STATUTES AND LEGISLATIVE MATERIALS

U.S. Const. art. I, § 8, cl. 3	2
15 U.S.C. § 1	10, 14
18 U.S.C. §§ 891 *et seq.*	2, 9
§ 1951	19
§§ 1961 *et seq.*	6, 11
§ 1962	*passim*
21 U.S.C. § 347	9

TABLE OF AUTHORITIES—Continued

	Page
§ 347a	9
§ 360	9
42 U.S.C. § 2000a	9
Pub. L. No. 87-781, § 301 (1962)	9
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922	11
S. 2048, 90th Cong., 1st Sess. (1967)	17
Measures Relating to Organized Crime: Hearings on S. 30, S. 994 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 496 (1969)	11
115 Cong. Rec. 9567 (1969)	16

BOOKS AND JOURNALS

Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 232.1c, 301-04 (1994 Supp.)	16
Stephen Calkins, *The 1990-91 Supreme Court Term and Antitrust*, 60 ANTITRUST L.J. 603 (1991)	16
THE FEDERALIST No. 45 (Charles A. Beard ed., 1948)	23

REPORTS AND MISCELLANEOUS MATERIALS

Conference of Chief Justices, Resolution IX (Feb. 10, 1994)	29
Judicial Conference of the United States, Federalization of State Prosecutions, Position of the Judicial Conference of the United States (Sept. 20, 1991)	28
National Governors Ass'n, HR-25 Policy (July 1994)	29
Ninth Circuit Judicial Conference, Mem. No. 4 (Aug. 1993)	29
Report of the Fed. Courts Study Comm. (Apr. 2, 1990)	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-251

UNITED STATES OF AMERICA,
Petitioner

v.

JUAN PAUL ROBERTSON

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 15 F.3d 862 (9th Cir. 1994).

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1994. The court of appeals denied a petition for rehearing on April 26, 1994. On July 15, 1994, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to August 24, 1994. The petition for a writ of certiorari was filed on August 10, 1994, and granted on October 17, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, are set forth in an appendix to this brief.

STATEMENT

1. On November 15, 1983, respondent Juan Paul Robertson, stole a Cadillac containing $980,000 and two kilograms of cocaine. In 1984, respondent and his wife purchased a home near Phoenix for $270,000 in cash. Pet. App. 3a; Tr. 61-76, 371-72. They also made additional large cash purchases totalling approximately $700,000. Pet. App. 3a; Tr. 383-405.

In 1985, respondent and Richard Horchler agreed as equal partners to buy mining claims in Alaska. Horchler negotiated the purchase of the claims for $125,000. He and a crew went to Alaska to begin work to make the claims operational. There, he purchased heavy equipment, including a bulldozer and frontloader, bought hand tools, and made arrangements to buy a generator. Respondent gave Horchler $85,000 for initial purchases and for salaries. Tom Black, a friend of respondent, purchased a small truck in Los Angeles and drove to Alaska with some of his tools to assist in setting up the mine. While in Alaska, Horchler and respondent agreed to name the mining operation "Double Eagle." The "Double Eagle" mining partnership lasted from June 20, 1985 until July 31, 1985, when it was dissolved. Thereafter, the mining operation became "Robertson Mining Company." A small quantity of gold was mined and sold in 1985. Tr. 825-36, 608-12, 909, 915, 1004-15, 2067.

In 1986, Tim Robertson, respondent's brother, and Boyce Clock drove the Cadillac to Alaska so that they could work with respondent and others at the mine. The Cadillac was wrecked after they arrived, and was inoperable at the mine. Respondent obtained his pilot's license in 1986, bought a plane, and used it to fly from Alaska. Tr. 757-58, 1720, 1904-05.

According to respondent's ex-wife, in 1986, she and respondent received a $300,000 loan secured by the house in Phoenix. Respondent allocated a portion of this loan for mine expenses. Approximately $200,000 of gold was sold by the mine. All of the purchasers were Alaskan refiners. Respondent kept about $30,000 of nuggets. *Id.* at 453-60, 782-83, 1906-07. In 1987, the mine was not profitable; and that year respondent gave the mine to his wife as part of their dissolution. *Id.* at 1985-86.

2. On October 17, 1991, respondent was indicted on eight narcotics and racketeering counts. A jury found respondent guilty on four narcotics counts and one count of investing racketeering proceeds in an enterprise, the activities of which affect interstate commerce, in violation of 18 U.S.C. 1962(a). Respondent was sentenced to concurrent terms of twenty years imprisonment on each of the five counts.

3. The court of appeals reversed respondent's RICO conviction and affirmed the narcotics convictions. Pet. App. 7a-10a. In a unanimous decision, the panel held that RICO's interstate nexus requirement was not satisfied because "the Government failed to establish that the RICO enterprise had anything more than an incidental effect on interstate commerce." *Id.* at 9a. The court noted that "none of the gold obtained from the mine was sold outside Alaska." *Id.* The court further found that "[t]he mine was a relatively small and entirely local operation." *Id.* The court rejected the Government's argu-

ment that respondent's use of an airplane and the Cadillac were sufficient to establish the requisite impact on interstate commerce. *Id.* at 10a. Evidence that some start-up funds originated in Arizona was similarly disregarded as not an activity of the enterprise. "There was no evidence introduced to show that the activities of the enterprise *itself* affected interstate commerce." *Id.* at 9a.

Judge Reinhardt, writing a special concurrence, expressed concern over the overcharging of respondent by the prosecution. "Rather than simply prosecuting the defendant on the basis of the overwhelming evidence of his illicit drug activity, the prosecutors . . . decided to turn the defendant's ownership of a gold mine into the centerpiece of his prosecution." *Id.* at 28a-29a. Judge Reinhardt stated that the "practice of overcharging a defendant involves an abuse of the prosecutor's generally unreviewable discretion." *Id.* at 29a-30a. He further noted that RICO "seems particularly susceptible to prosecutorial abuse, given that its scope is broad and somewhat ill-defined, and its penalties are severe." *Id.* at 32a.

The Government's petition for rehearing was denied and its suggestion for rehearing en banc was rejected without dissent on April 26, 1994.

SUMMARY OF ARGUMENT

Respondent was charged and convicted under 18 U.S.C. § 1962(a) which makes unlawful the investment of funds derived from a pattern of racketeering activity in an enterprise whose activities "affect[] interstate or foreign commerce." The activities of respondent's gold mine did not "affect" interstate commerce within the meaning of the statute.

A. Under this Court's precedents, congressional power to regulate activities affecting interstate commerce extends only to those activities which individually or when aggregated as a class have a "substantial effect" upon interstate commerce. If Congress sets out to regulate a particular industry or "class of activity," courts review Congress's determination that the cumulative effect of the activities of the industry or class has a substantial effect on interstate commerce. Neither the language of the RICO statute nor its legislative history demonstrates a congressional purpose to regulate a "class of activities." Rather, 18 U.S.C. § 1962(a), like the Sherman Act, is a general prohibition. Accordingly, under RICO the fact-finder must analyze the individual activities of the enterprise in question to determine whether they have a substantial effect on interstate commerce.

B. Applying the "substantial effect" standard and conducting a particularized inquiry compel the conclusion that respondent's gold mining enterprise had an insufficient nexus with interstate commerce under 18 U.S.C. § 1962(a). First, the sales of gold from the mine were only approximately $200,000 over a three-year period, and all the sales were made to refiners within Alaska. Second, the investment of monies in the mine and equipment in order to establish and sustain the operation is not an "activit[y] of [the mine] which affects[] interstate commerce." Third, the use of the telephones and mails is a concomitant but is not an activity of the mine as contemplated by the RICO statute. If such use were a sufficient "effect" on commerce, then federal laws like RICO and the Sherman Act would cover every imaginable form of economic activity.

C. The "substantial effect" standard and a rigorous particularized inquiry serve to preserve the delicate balance between state and federal power and to maintain the separation of powers. To apply a lesser standard would, in the case of RICO, result in an unwarranted federalization and proliferation of criminal and civil cases. In general, because other statutes, such as the Sherman Act, also base jurisdiction on effects upon commerce, it would result in a further overburdening of the federal courts.

ARGUMENT

I. THE ACTIVITIES OF RESPONDENT'S GOLD MINE DID NOT HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE AND ARE THEREFORE BEYOND THE REACH OF RICO.

Congress "can exercise only the powers granted to it" by the Constitution. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). "[U]nlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). Under the Commerce Clause, Congress can regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities affecting commerce. *Perez* v. *United States*, 402 U.S. 146, 150 (1971).

In the instant case, jurisdiction is asserted based upon the third category—activities affecting commerce. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, prohibits the investment of racketeering proceeds into an "enterprise . . . the activities of which affect[] interstate or foreign commerce." *Id.* § 1962(a). The issue here is the requisite "effect" on interstate commerce necessary to fall within the reach of RICO.

A. Under this Court's precedents, Congress's power to regulate activities affecting interstate commerce extends only to those activities which individually or as a class have a *substantial* effect on interstate commerce.

Petitioner urges the Court to hold that "perceptible and identifiable" effects upon interstate commerce are sufficient to confer jurisdiction under the Commerce Clause. Pet. Br. 25; see *infra* at Part I, A-5. This Court, however, has long held that the Commerce Clause grants Congress

the power to regulate activities "affecting commerce" only when they have a *substantial effect* on interstate commerce. In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court held that Congress could regulate labor relations at any manufacturing plant which had interstate sales. See *id.* at 40-42. *Jones & Laughlin* was issued less than one year after the Court struck down the application of the same statute to striking coal miners because mining was "manufacturing" not "commerce." See *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 302 (1936). The *Jones & Laughlin* Court adopted a more expansive definition of "commerce," which emphasized the interconnected nature of the national economy, declaring that a work stoppage "would have a most *serious effect* upon interstate commerce." *Jones & Laughlin*, 301 U.S. at 41 (emphasis added). The requirement of a "serious effect" was necessary to counter the concern, as expressed by Chief Justice Hughes, that

> [t]he authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

Id. at 30.

In *United States* v. *Darby*, 312 U.S. 100 (1940), this Court stated, "But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a *substantial effect* on interstate commerce." *Id.* at 119 (citing *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U.S. 453, 466 (1938)) (emphasis added). In *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942), Chief Justice Stone wrote that the commerce power "extends to those intrastate activities which in a *substantial way* interfere with or obstruct the exercise of

the granted power." *Id.* at 119 (emphasis added). Similarly, in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), in an oft-quoted passage, the Court stated:

> even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect* on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id. at 125 (emphasis added); see also *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 244 (1980); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 302 (1964); *Perez*, 402 U.S. at 151-52. The necessity of a "substantial effect" on interstate commerce was directly addressed by Justice Harlan who, writing for the Court in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), declared: "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.* at 196 n.27; see also *Hodel*, 452 U.S. at 309 (Rehnquist, J., concurring); *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985) (referring to "all activity *substantially* affecting interstate commerce") (emphasis added) (citations omitted).

1. *Most regulations of activities "affecting commerce" are "class of activities" statutes that do not require a particularized inquiry into a party's effect on interstate commerce.*

Congress has exercised its power to regulate activities "affecting commerce" in two distinct ways. Typically, Congress has enacted statutes regulating an entire class of activities that in the aggregate has a substantial effect on interstate commerce. In some instances, however, Congress enacts a general prohibition, like the Sherman Act. In such general prohibitions, Congress writes a jurisdictional requirement into the text of the statute.

In 1942, this Court held that the production of a single wheat farmer was within the scope of federal regulation because "taken together with that of many others similarly situated" it had "a substantial influence on price and market conditions." *Wickard*, 317 U.S. at 128. Congress has relied on the "cumulative effect" principle of *Wickard* as its constitutional justification for the enactment of civil rights legislation;[1] regulatory measures affecting the sale of foods and additives;[2] a registration law for drug producers;[3] and criminal statutes.

For example, in Title II of the Consumer Credit Protection Act, 18 U.S.C. §§ 891 *et seq.*, Congress made explicit findings that extortionate credit transactions affect interstate commerce.[4] In interpreting the Act, this Court held that—based on legislative findings that loan-sharking in general substantially affected interstate commerce—Congress could make criminal any purely intrastate loan-sharking activity:

> Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise as trivial, individual instances" of the class.

Perez, 402 U.S. at 154 (quoting *Wirtz*, 392 U.S. at 193).

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[1] *See, e.g.*, 42 U.S.C. § 2000a, upheld in *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964).

[2] *See, e.g.*, 21 U.S.C. §§ 347, 347a (oleomargarine).

[3] *See, e.g.*, 21 U.S.C. § 360; Public Law 87-781, § 301 (1962).

[4] Section 201(a) of Title II states in pertinent part: "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." 18 U.S.C. § 891.

The judicial inquiry is relatively superficial when Congress has identified the activity or industry to be regulated, and findings (explicit or implicit) demonstrate a substantial effect on interstate commerce. "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel*, 452 U.S. at 276.

Thus, in cases involving a "class of activities" statute, a court need find only that the party is a member of a class whose activities Congress could rationally have found have a substantial effect on interstate commerce. When interpreting such statutes, the "substantial effect" on interstate commerce is relatively easy to show because an entire industry or market will almost always have a substantial effect on interstate commerce.

2. General prohibitions require a particularized inquiry into the nexus between a party's activity and interstate commerce.

In contrast, the judicial inquiry is more rigorous and involves a particularized determination of fact when cases are brought under statutes containing general prohibitions, like the Sherman Act and RICO. Congress cannot possibly predetermine all the types of trade or enterprises intended to be covered by RICO or the Sherman Act. In such statutes, Congress has included a nexus element requiring proof that a particular activity or enterprise sufficiently affects interstate commerce. See 15 U.S.C. § 1; 18 U.S.C. § 1962. Congress leaves the nexus determination to be made by the courts on a case-by-case basis. As stated by this Court in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974):

> The jurisdictional inquiry under general prohibitions . . . like § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs *significantly* from that required when Congress itself has defined the specific persons and activities

> that affect commerce and therefore require federal regulation.

Id. at 197 n.12 (emphasis added).[5]

3. RICO is not a "class of activities" statute.

RICO is a general prohibition intended to cover a broad range of enterprises. The statute was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941. The "Statement of Findings and Purpose" that prefaced the Act declares Congress's concern with organized crime and its infiltration of legitimate businesses. Pub. L. No. 91-452, § 1, 84 Stat. 922-23; 18 U.S.C. § 1961. The legislative history lists a broad range of activities that had been overtaken by organized crime, including banking, construction, football, and restaurants. See *Measures Relating to Organized Crime: Hearings on S. 30, S. 994 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 496 (1969) (Stmt. by Sen. McClellan).

Neither the "Statement of Findings and Purpose" nor the legislative history, including congressional findings, indicates that Congress intended to regulate a "class of activities."[6] The jurisdictional requirement that an "enterprise . . . affect interstate or foreign commerce" is a further indication that RICO is not a "class[] of activities"

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[5] The *Perez* Court also noted the distinction, stating, " 'Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. . . . And sometimes Congress itself has said that a particular activity affects the commerce . . . .' " *Perez* v. *United States*, 402 U.S. 146, 152 (1971) (quoting *United States* v. *Darby*, 312 U.S. 100, 120-21 (1940)).

[6] The Ninety-First Congress certainly was aware of its power to adopt a "class of activities" approach. Pub. L. No. 91-452, 84 Stat. 936—the same act that contains RICO—contains an explicit finding that illegal gambling has "an effect upon, interstate commerce . . . ." *Id.*

statute and that a determination as to whether there is a "substantial" effect on interstate commerce is to be made by the courts. *Cf. Gulf Oil,* 419 U.S. at 208.[7]

Petitioner argues that the gold mine is part of a "class of activities" that "in the aggregate substantially affects interstate or foreign commerce." Pet. Br. 21. Unlike *Perez* v. *United States,* 402 U.S. 146, 153-54 (1971) (class defined by Congress as loan-sharking activities), *Wickard* v. *Filburn,* 317 U.S. 111, 124-25 (1942) (class defined as wheat farmers), and *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 120 (1942) (class defined as intrastate milk market), petitioner can point to no identifiable class that Congress identified and sought to regulate by the enactment of RICO.

By arguing that RICO should be treated as a "class of activities" statute (Pet. Br. 19-21) and that the phrase "affecting interstate commerce" indicates Congress's intent to exercise its full power, petitioner appears to be proposing a "class" coterminous with the full reach of Congress's commerce power. This class would be comprised of all enterprises affecting interstate commerce into which racketeering funds could be invested. Such a class is far broader than the categories defined in traditional "class of activities" statutes. See *supra.* Such a broad class makes the act of defining a class meaningless. Moreover, a class with such an ill-defined boundary is particularly inappropriate for delineating criminal liability and would present the possibility of prosecutorial abuse.[8]

[7] Although the presence of a nexus element in the statute is a strong indicator of a general prohibition, there is at least one statute that contains findings *and* a nexus element requiring that the agency (the National Labor Relations Board) make a more particularized inquiry. *See Polish Nat'l Alliance of the United States of N. Am.* v. *NLRB,* 322 U.S. 643, 648 (1944). As petitioner notes, in that case the Court held that the Board should apply a "class of activities" approach. *Id.*; Pet. Br. 20 n.6. However, unlike the instant case, Congress set forth specific findings in the NLRB regarding the class of activities. *See NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 22 (1937) (discussing findings found at 29 U.S.C. § 151).

While petitioner also contends that the class of activity is the precious metal industry (Pet. Br. 21), RICO was not enacted for the purpose of protecting just this industry. It may be true that Congress can regulate gold mines through, for example, safety and environmental laws. It is very doubtful, however, that such laws were meant to extend the reach of RICO's civil and criminal provisions, the Sherman Act, and other general prohibitions. The question is not whether Congress has the power to regulate gold mines, but whether RICO's proceeds provision, 18 U.S.C. § 1962(a), reaches respondent's gold mine. The class of activities approach defers to a congressional determination about an industry or practice in the statute at issue; it does not allow prosecutors, juries, or courts to fill in the class of their choice.[9]

[8] *See Kolender* v. *Lawson,* 461 U.S. 352 (1983). In *Kolender* this Court recognized that the vagueness doctrine's "more important aspect" is its requirement that legislatures not permit arbitrary and discriminatory enforcement of criminal statutes by giving unbridled discretion to those who must apply them. *Id.* at 358. To permit the class of proscribed enterprises under § 1962(a) to be defined simply by reference to the full reach of the commerce power would create a net so large and indefinite that prosecutors, judges, and juries would be left free to step inside and pursue their own personal predilections without even minimal guidelines. *See generally Smith* v. *Goguen,* 415 U.S. 566, 575 (1973); *United States* v. *Reese,* 92 U.S. 214, 221 (1876). Judge Reinhardt expressed this concern in his special concurrence in this case. *See* Pet. App. 29a-32a.

[9] Petitioner relies on *Russell* v. *United States,* 471 U.S. 858 (1985). In *Russell,* the Court held that a federal anti-arson statute covering "any building . . . used . . . in any activity affecting interstate or foreign commerce" applied to an apartment building. *Id.* at 862 (quoting 18 U.S.C. § 844(i)). The Court, citing *Perez,* justified its holding by arguing that the commercial market in rental properties substantially affects interstate commerce. *Id.* The Court held the arson statute to be a class of activities statute,

4. *Sherman Act cases provide the best model for the appropriate judicial inquiry.*

The Sherman Act cases are an appropriate model for the type of particularized inquiry required when courts analyze the reach of a general prohibition like RICO. The Sherman Act prohibits activities "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Since 1948, this Court has held that this jurisdictional requirement is satisfied by a showing that the activities at issue in a particular case substantially affect commerce. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234, 237 (1948). See also *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980).

Courts reviewing a challenge to the Sherman Act's interstate commerce requirement have focused on the activity of the particular party before the court—not the activities of the entire industry to which that party belongs. For example, in *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976), this Court did not examine whether the hospital industry affected commerce, but rather whether defendants' alleged conspiracy had a substantial effect on interstate commerce. *Id.* at 744. Similarly, in *McLain*, the test was not whether the entire real estate brokerage industry affected interstate commerce.[10] Courts typically have focused either on the defendant's general business activities or the impact of

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not a general prohibition like the Sherman Act. Indeed, the Court quoted from legislative history showing that Congress intended for the statute to cover almost all buildings except most private homes. *Id.* at 861 nn.6-7.

[10] In 1980, in *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), this Court appeared to endorse both a focused inquiry into whether the particular restraint on trade had an effect on interstate commerce and a relatively broader inquiry into the impact of defendant's business activities on interstate commerce. *Id.* at 232, 242, 246.

defendant's alleged restraint on trade.[11] In order to find a Sherman Act violation, the activities at issue must " 'as a matter of practical economics' . . . have a not insubstantial effect on the interstate commerce involved." *McLain*, 444 U.S. at 246 (quoting *Hospital Bldg.*, 425 U.S. at 745).

Since 1980, a number of courts of appeal have held that Sherman Act defendants' business activities and/or the alleged conspiracy had an insufficient nexus with interstate commerce. The Eighth Circuit examined the activities of the defendant's trash collection business and held that the business did not substantially affect interstate commerce despite its purchase of out-of-state trucks and equipment. *Heille* v. *City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982). In the precedent relied on by the Ninth Circuit in this case, the panel unanimously held that a mobile catering company's activities did not have a substantial "effect on interstate commerce." *Musick* v. *Burke*, 913 F.2d 1390, 1396 (9th Cir. 1990). The *Musick* Court held that the purchase of supplies and equipment from out of state, by itself, is an insufficient showing of interstate commerce nexus. *Id.* In one of the many cases involving doctor's privileges, the Sixth Circuit held that excluding a doctor from a local hospital has no more "than a de minimis impact on interstate commerce." *Stone* v. *William Beaumont Hosp.*, 782 F.2d 609, 614 (6th Cir. 1986).

In 1991, in *Summit Health*, this Court held that the denial of a doctor's privileges had a sufficient nexus with interstate commerce. *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 331-32 (1991). Although the basis for the decision is not altogether clear, the *Summit Health* Court conducted a particularized inquiry into both the effect of

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[11] *See infra* at pages 15-16 & notes 12-13 (discussing the alternative readings of *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322 (1991)).

defendant's business activity and the effect of the alleged restraint.[12] The *Summit Health* Court noted that defendant was engaged in interstate commerce and that the conspiracy would affect the defendant's purchase of out-of-state medicine and supplies *and* the revenues from out-of-state insurance companies. *Id.* at 330. The Court further held that " 'as a matter of practical economics' there will be a reduction in the provision of ophthalmological services in the Los Angeles market." *Id.* at 331 (quoting *Hospital Bldg.*, 425 U.S. at 745).[13]

The Sherman Act is a particularly appropriate guide in RICO cases. The similarities between RICO and the Sherman Act go beyond their applicability to a broad range of enterprises. RICO was modeled, in part, on antitrust laws, "draw[ing] heavily upon the remedies developed in the field of antitrust." 115 Cong. Rec. 9567 (1969) (Senator McClellan's comments regarding S. 1861, which later became RICO). This Court has "repeatedly observed . . . that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws." *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct.

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[12] *See* Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 232.1c, 302-04 (1994 Supp.) (arguing that the Court could have decided *Summit Health* on the basis of the effect of defendant's activities or the effect of the conspiracy); Stephen Calkins, *The 1990-91 Supreme Court Term and Antitrust*, 60 ANTITRUST L.J. 603, 625-28 (1991) (same).

[13] *Summit Health* could also be read to endorse a class-of-activities approach. Such a reading has been criticized by Professor Areeda and the four dissenting justices. *See* Areeda & Hovenkamp, *supra* n.12, at 302; *Summit Health*, 500 U.S. at 333-34 (Scalia, J., dissenting); *see also* Calkins, *supra* n.12, at 625-26. Even if *Summit Health* is read to require a market-wide inquiry, this is uniquely appropriate to antitrust law. In a post-*Summit Health* decision, the Seventh Circuit held that it was the potential to incrementally cartelize markets that necessitated a broader inquiry. *Hammes* v. *AAMCO Transmissions, Inc.*, 33 F.3d 774, 781 (7th Cir. 1994); *see also* Areeda & Hovenkamp, *supra* n.12, at 304.

1311, 1317 (1992) (internal citations omitted). Indeed, the predecessor to RICO was proposed as an amendment to the Sherman Act. See S. 2048, 90th Cong., 1st Sess. (1967). In other contexts, courts have turned to antitrust standards to establish a test under RICO. See *Holmes*, 112 S. Ct. at 1317-18 (applying antitrust causation standards when interpreting RICO's treble damages provision); see also *United States* v. *Local 560 (I.B.T.)*, 974 F.2d 315, 332 (3d Cir. 1992) (applying antitrust injunction standards in a RICO case).

5. *Petitioner posits a standard contrary to this Court's precedent in suggesting that the "effects" on interstate commerce under RICO are sufficient if they are "perceptible and identifiable."*

As discussed at the outset, this Court has repeatedly required that activities regulated by Congress have a "substantial effect" on interstate commerce. Petitioner urges a standard of "perceptible and identifiable." Pet. Br. 25. If such a standard has applied at all, it has applied to an individual member of a class challenging the scope of a "class of activities" statute. In addition to citing "class of activities" cases, petitioner relies on two antitrust cases that do not support its proposed standard.

Petitioner relies on *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) and *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) to argue that the effects on interstate commerce do not have to be "substantial" but that it is enough that they are "perceptible and identifiable." Pet. Br. 24-25. That is not the holding of those cases. In *Mandeville Island Farms*, this Court stated that "the vital question becomes whether the effect is sufficiently *substantial* and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence," 334 U.S. at 240 (emphasis added).[14] In *Goldfarb*, the Court stated that "[g]iven the

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[14] Petitioner quotes *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. at 232, for the proposition that " 'the essence'

substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected." *Goldfarb*, 421 U.S. at 785 (emphasis added) (internal footnote omitted). This Court, however, has held that *Goldfarb* was based on a "stream of interstate commerce" analysis rather than an "effect on commerce" test. Therefore, whatever the standard is in *Goldfarb*, it does not apply here. See *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 244 (1980).[15]

The difficulty in determining whether there has been a sufficient effect upon interstate commerce to satisfy the Commerce Clause has led many lower courts to conclude that virtually any activity connected with interstate commerce is sufficient. See Pet. Br. 18-19, and cases cited therein. As noted *supra*, however, this Court has repeatedly held that the connection with interstate commerce must be "substantial."[16] If Congress had intended

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of the modern rule is that the nature or degree of the impact is irrelevant to whether Congress may exercise its powers to regulate an activity." Pet. Br. 25. The case does not stand for that proposition, but rather discusses the *Shreveport Rate Cases*, 234 U.S. 342 (1914), and states that the commerce power comprehends not only transportation but manufacturing that is linked to interstate commerce.

[15] Petitioner quotes *Goldfarb* v. *Virginia State Bar*, 421 U.S. 784, 785 (1975), as stating that, rather, this Court's "cases have shown that, once an effect [on interstate commerce] is shown, no specific magnitude need be proved." Pet. Br. 25.

[16] Petitioner cannot rely directly on Supreme Court authority for its proposed "perceptible and identifiable" effects test. For example, petitioner cites *Rose* v. *Bartle*, 871 F.2d 331, 356-57 (3d Cir. 1989), for the proposition that all that is required is a "minimal" interstate nexus. *Rose* relies on *R.A.G.S. Culter, Inc.* v. *Hyatt*, 774 F.2d 1350, 1353 (5th Cir. 1985), which in turn cites *United States* v. *Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). *Rone* refers to *Perez*, *supra*, to assert that a "minimal" nexus of the enterprise to interstate commerce satisfies the Commerce Clause. *Id.* at 573. *Perez* did not hold, however, that a "minimal" connection between the enterprise and interstate commerce satisfies the requirements of the Commerce Clause; rather, *Perez* held that Congress had a basis to determine that a "class of activities," loan sharking, affected interstate commerce and that the courts have no power " 'to excise, as trivial, individual instances' " of the class. *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968)).

to depart from its historical and traditional "substantial effect" requirement,[17] then it should have clearly spelled out the reach of the power that it intended to exercise. *Cf. Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991); *United States* v. *Lopez*, No. 93-2047, Oral Argument Tr. 23.[18]

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[17] Congress has written nexus elements that apparently have resulted in a less rigorous standard than "substantial effect." For example, the Hobbs Act covers "[w]hoever *in any way or degree* obstructs, delays or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a) (emphasis added). Petitioner argues that the Hobbs Act cases should govern here. However, the plain language of the nexus requirement in the Hobbs Act differs from that in the RICO statute and the standard developed in Hobbs Act cases should not be applied to RICO cases.

[18] The requirement that Congress speak plainly has its roots in the "constitutionally mandated balance of power" between state and national government which reflects the Founders' deliberate preference for decentralized government. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). This "federalist structure of joint sovereigns" was intended by the Founders to "ensure the protection of 'our fundamental liberties' by preventing 'the accumulation of excessive power' by either." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *Garcia*).

Under the Supremacy Clause, Congress has the power to significantly alter the "substantial sovereign powers" retained by the states under this constitutional structure of dual sovereigns. *Id.* at 461. To safeguard against the unnecessary erosion of state power, this Court has thus adopted the plain statement requirement as a rule of statutory construction. Federal legislation will not be construed to invade areas of traditional state sovereignty

B. The *activities* of respondent's gold mine did not substantially affect interstate commerce and are beyond the reach of RICO.

In order to make out a violation of 18 U.S.C. § 1962(a), there must be evidence that the activities of *the enterprise itself* substantially affected interstate commerce. It is immaterial whether the predicate racketeering activities affected interstate commerce.[19] It is immaterial whether the use or investment of income derived from these racketeering activities affected interstate commerce.[20] It is immaterial whether the acts involved in the acquisition or establishment of the enterprise by the use or investment of racketeering income affected interstate commerce. Yet, petitioner focuses almost exclusively upon the actions of respondent and others carried out during the acquisition and establishment of the mine or on actions ancillary to the activities of the mine (the mining and selling of gold).

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unless the language of the statute makes it "absolutely certain," *id.* at 464, that Congress intended "to pre-empt the historic powers of the States," *id.* at 461, and "alter the usual constitutional balance of power." *Id.* at 460. This rule assures that Congress has "in fact faced, and intended to bring into issue" the question of the proper balance of power between state and federal governments. *Id.* at 461. In view of the numerous holdings of this Court that the words "affect interstate commerce" require a "substantial effect" it cannot be said that Congress made it "unmistakably clear" that it intended to reach insubstantial effects by using the "affects" language in RICO.

[19] As the court of appeals held in its opinion, "the Government must prove that the activities of the enterprise itself affect interstate commerce and not that each predicate act affects interstate commerce." Pet. App. 8a (citing *United States* v. *Bagnariol*, 665 F.2d 887, 892 (9th Cir. 1981), *cert. denied sub nom. Walgren* v. *United States*, 456 U.S. 962 (1982)).

[20] It is not the act of investing that must substantially affect interstate commerce. The "investment" required by the statute can be "direct or indirect[]" and can apply to the "establishment or operation." However, the "investment" is a separate element from the "enterprise," and the geographical origin of the investment is not the focus of the jurisdictional nexus inquiry.

Petitioner first argues that the mine's purchase of equipment and supplies, the hiring of employees from outside Alaska, and the purchase by respondent of an airplane to travel to and from Alaska as well as the transportation of a car from California to Alaska, are sufficient to prove that the gold mine's activities "affect[] interstate . . . commerce" within the meaning of section 1962(a). Pet. Br. 18. The majority of the equipment for the mine was purchased in Alaska. Tr. 902-03. Although the Cadillac was driven to Alaska in 1986, it was inoperable at the mine. Tr. 757-58. The airplane was flown out of Alaska by respondent in 1986, but there is no evidence that it was ever used in connection with the mine. 18 U.S.C. § 1962 (a) requires that the activities of the enterprise "affect interstate commerce."

If the factors relied upon by petitioner can somehow be viewed as activities of the mine, they are certainly trivial—not substantial—and should not provide a basis for RICO jurisdiction. Because virtually any business orders supplies, either directly or indirectly from another state, and has at least one employee who has driven a vehicle from another state at some point in time, to adopt petitioner's argument would be to hold that the activities of every business have a sufficient effect on interstate commerce to invoke the Commerce Clause. This was not the intent of Congress.

Petitioner next argues that the sale of approximately $200,000 of gold had a sufficient effect on interstate commerce. It should be noted that these sales occurred over a three-year period and were made to refiners within the state of Alaska. While petitioner refers to the amount of gold sold as "significant" (Pet. Br. 20), the court of appeals stated that "[t]he mine was relatively small and an entirely local operation, only producing approximately $200,000 in gold." Pet. App. 9a.

Relying on this Court's cases holding that the cumulative effect of individual activities can be used to satisfy

the commerce power, petitioner argues that "the intrastate sale of the mine's output clearly affected interstate and foreign commerce." Pet. Br. 21. Petitioner fails, however, to point to a discrete class, identified by either the RICO statute or by Congress in the legislative history of RICO, of which intrastate gold mining and sales are a part. See *supra* Part I A-3.

The court of appeals was correct in finding that none of the other activities referenced by petitioner were activities of the mine itsself. Petitioner argues that respondent's refinancing of his home in 1986 had an effect on interstate commerce since the purpose of refinancing was to raise operating expenses for the gold mine. Within the context of the real estate and credit market in Arizona, any effect was relatively trivial.[21] In addition, it was an activity of respondent relating to the use or investment of proceeds from racketeering activity and was not an activity of the enterprise which was involved in the mining and sale of gold as required under section 1962(a).

Finally, petitioner notes that the enterprise used the telephone and mails and contends that this is sufficient to satisfy a requisite effect on interstate commerce. Petitioner has not demonstrated that any phone calls or letters were activities of the enterprise.[22] Further, such slight or

[21] Petitioner relies on *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976), in asserting that out-of-state financing has an effect on interstate commerce. In that case, which involved the Sherman Act, the petitioner alleged a combination of several areas of interstate commerce in which respondent was involved: the purchase of up to eighty percent of its medicine and supplies from out-of-state sellers, a substantial number of patients coming from out of state, a large proportion of revenues coming from out-of-state insurance companies or from the federal government, a management service fee paid to its out-of-state parent company, *and* a large part of a planned four million dollar expansion to be financed through out-of-state lenders. No comparable combination of activity occurred here. *Id.* at 744.

[22] Although mail and telecommunications may furnish a basis for federal jurisdiction where they are used as "instruments of

trivial effects are insufficient to invoke Congress's commerce power. If petitioner's argument is correct, every economic activity and organization in the United States would have a sufficient effect on interstate commerce so as to qualify as an enterprise under RICO.

Respondent's mine was a small enterprise in Alaska which was not engaged in interstate commerce. Like all businesses, it had some incidental connections with interstate commerce. The totality of these connections cannot be considered "substantial" so as to conclude that the mine "affected" interstate commerce. As this Court has stated, "[s]cholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." *Polish Nat'l Alliance of the United States of N. Am.* v. *NLRB*, 322 U.S. 643, 650 (1944).

II. THE EXPANSION OF FEDERAL JURISDICTION INTO AREAS HAVING MINIMAL CONNECTION WITH INTERSTATE COMMERCE IMPOSES SUBSTANTIAL COSTS ON THE FEDERAL-STATE BALANCE AND RIGHTS GRANTED UNDER STATE LAW.

It is axiomatic that "[t]he Constitution created a Federal Government of limited powers." [23] *Gregory* v. *Ash-*

crime," *see, e.g., McNally* v. *United States*, 483 U.S. 350, 365 (1987) (internal quotation omitted), such is not the case here. The use of the mails and phones was a concomitant—not an activity—of the mine and did not facilitate any unlawful actions.

[23] James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, at 202 (Charles A. Beard ed., 1948).

croft, 501 U.S. 457 (1991). The doctrine of federalism holds that many states may be firmly and permanently united under a strong central government endowed with large powers, and may at the same time retain liberty for their people and full autonomy in the management of internal affairs. The federalist system was designed to provide decentralized government which would foster innovation and experimentation by the States and involvement in the democratic processes by their citizens. Perhaps most important, "[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the framers to ensure the protection of our fundamental liberties." *Id.* at 458 (Powell, J., dissenting) (internal quotations and citations omitted).

A. The "substantial effects" test serves to preserve the delicate balance between state and federal power.

Since the adoption of the Constitution, a constant tension has existed between the need for a strong national government on the one hand and the interests of the States, their citizens, and decentralized government on the other hand. This tension is reflected in the Court's jurisprudence during over 200 years of interpreting the Commerce Clause. With the transformation from an agrarian to a highly sophisticated and technological economy, the Commerce Clause has been used increasingly as a basis for federal legislation, including, of course, the enactment of criminal statutes. Nevertheless,

> the interpenetrations of modern society have not wiped out State lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology.

Polish Nat'l Alliance of the United States of N. Am. v. *NLRB*, 322 U.S. 643, 650 (1944).

The "substantial effect" standard serves to preserve the delicate balance between state and federal power and to maintain the separation of powers. Maintaining some limit on the scope of Congress's regulatory power is necessary to prevent federalization of all imaginable activity. If mere use of the telephones and the mails brings an activity within Congress's reach, federal regulation also could cover babysitting, and jaywalking could be a federal crime.

Similarly, in the absence of a finding that Congress intended to regulate a class of activities, a rigorous judicial inquiry regarding jurisdiction should be required. Some deference to congressional determinations is due, but when Congress leaves the jurisdictional inquiry to the fact-finder that determination should be individualized. This is particularly true when a defendant's liberty is at stake.

B. RICO is already an expansive statute reaching activities other than organized crime; an extension of jurisdiction would be unwarranted and unwise.

RICO's definitions of "pattern" and "enterprise" are already extremely broad. An expansive reading of RICO's jurisdictional requirement would not only be legally unjustified, but would also be unwise as a practical matter. It has been widely recognized that RICO covers far more than organized crime. With its civil provisions, RICO reaches garden variety commercial disputes.[24] With its criminal provisions, RICO reaches persons like respondent who should have been charged only with the narcotics counts. See *United States* v. *Robertson*, 15 F.3d 862

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[24] The actual and potential proliferation of civil RICO cases has been repeatedly acknowledged. *See, e.g., Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 482, 503-04 (1985) (Marshall, J., dissenting); *Schreiber Distrib. Co.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring). Civil plaintiffs are not always constrained by either guidelines or scarcity of resources, as is the case with criminal prosecutors.

(9th Cir. 1994); Pet. App. 29a-32a (Reinhardt, J., concurring).

Petitioner urges an interpretation of the Commerce Clause that would enhance "a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 581, 584 (1985) (O'Connor, J., dissenting). Under petitioner's interpretation of the Commerce Clause, any federal prosecutor or any civil plaintiff can bring an action under RICO if there is a "pattern" of racketeering activity with subsequent investment in an "enterprise" where the "enterprise" makes as little as one phone call to another state. In general, virtually any activity would be subject to the power. Almost any private activity has some ultimate theoretical effect on interstate commerce. For example, a jaywalker presents the possibility of an automobile accident which will bring into play insurance companies which do business across state lines. Under petitioner's argument, the cumulative effect of jaywalking would give Congress the power to make jaywalking a federal offense.[25]

[25] Petitioner argues that Congress intended RICO to have a broad scope and to effectuate this purpose provided that "[t]he provisions of RICO shall be liberally construed to effectuate its remedial purposes." Pet. Br. 13-14 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947). This ignores the fact that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 809, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). Although RICO is both a criminal and civil statute, it must be strictly interpreted. *Cf. F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954); *United States* v. *McNinch*, 356 U.S. 595, 598 (1958). The rule of lenity:

> is founded on two policies that have long been part of our tradition. First, a "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste of men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and The Reading of Statutes, in Benchmarks, 196, 209 (1967).

Moskal v. *United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting) (quoting *United States* v. *Bass*, 404 U.S. 336, 347-49 (1971)).

Respondent is well aware of the concern in this country about organized crime and its effects. See Pet. Br. 15-16. The fact that organized crime may be pervasive, however, does not mean that the Commerce Clause has unlimited scope. In addition, a clear and confined scope is particularly appropriate in the ever-increasing number of federal criminal statutes. As this Court recently held:

> [T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. *United States*, 112 S. Ct. 2408, 2434 (1992).

Almost a quarter of a century ago, Justice Stewart presciently stated:

> In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. In the circumstance that loansharking has an adverse impact on inter-

> state business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Perez v. *United States*, 402 U.S. 146, 157-58 (1971).

C. Federalization of criminal law is destroying the balance between state and federal power.

The Judicial Conference of the United States and various federal circuit judicial conferences have issued resolutions expressing concern about the effect of the expansion of federal criminal jurisdiction upon the very structure of federalism.[26] In 1991, the United States Judicial Conference opposed a proposed law which would define as a federal crime violent felonies involving handguns. The Conference said: "[s]uch expansion of federal jurisdiction would be inconsistent with long-accepted concepts of federalism and would ignore the boundaries between appropriate state and federal action." *Judicial Conference of the United States, Federalization of State Prosecutions, Position of the Judicial Conference of the United States* (Sept. 20, 1991). The Ninth Circuit Judicial Conference declared in 1993 that:

> The increased federalization of traditional state law crimes by the Congress has a far-reaching impact on our conceptual ideal of the complementary roles of state and federal courts. Such actions by Congress

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[26] This expansion of federal criminal law has also affected the performance of the courts. According to the Federal Courts Study Committee,

> [t]he deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing judges in larger metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog. It appears that the long expected crisis of the federal courts . . . is at last upon us.

Report of the Fed. Courts Study Comm., at 4-5 (Apr. 2, 1990).

> evince a lack of respect and faith in the ability of the states to handle their affairs, and places an unreasonable burden on the much smaller federal court system to handle expanding criminal dockets.

Ninth Circuit Judicial Conference, Mem. No. 4 (Aug. 1993).

Federal courts are not alone in their concern about expansive federal criminal jurisdiction. The Conference of Chief Justices, comprised of state, territorial, and commonwealth judicial officials, adopted a resolution prompted by the Senate's recent crime bill which stated, *inter alia*, that the Conference "strongly opposes federal action which, contrary to the principles of federalism and historical experience, would have the pernicious effect of federalizing state criminal law and procedure . . . . *Conference of Chief Justices*, Resolution IX (Feb. 10, 1994). Most recently, the National Governors Association declared "that some attempts to expand federal criminal law in traditional state functions . . . could undermine state and local anti-crime efforts," and "urge[d] legislators to pursue policies that recognized rather than erode[d] the state's role on the chief planners and administrators of criminal justice programs." *National Governors Ass'n*, HR-25 Policy (July 1994).

The activities of respondent's gold mine had far less effect on interstate commerce than most businesses. To hold that the mine's activities constituted a sufficient connection with interstate commerce to satisfy the jurisdictional requirement of RICO would be yet another step in the disruption of the traditional federal-state balance and in the formation of a truly national police power.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7033, 102 Stat 4398.)